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Supreme Court of the United States.

OCTOBER TERM, 1929.

No. 307.

THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY,

Appellant,

—against—

PHOENIX INDEMNITY CO.,

Appellee.

BRIEF FOR APPELLEE.

JEREMIAH F. CONNOR,
Attorney for Appellee.

THE COURT PRESS—Law Printers—47 West Street—Bowling Green 2820-1-4

SUBJECT INDEX.

PAGE

THE OPINIONS BELOW 1

STATEMENT 1

AGREED FACTS 3

THE QUESTIONS PRESENTED 4

ARGUMENT 4

I.—The provision of the New York Workmen's Compensation Law under review does not violate the due process clauses of the Fourteenth Amendment is justified because the wrongful act of appellant resulted in the death of the employee and set in motion the liability to the State Treasurer; because it promotes the public welfare, and is a part of the plan and scope of the Workmen's Compensation Law 4

II.—The provision under review does not set up any classification founded upon an unjust basis and does not violate the equal protection clause of the Fourteenth Amendment 13

III.—Appellee respectfully submits, therefore, that the provision under review does not violate any clause of the Fourteenth Amendment, and that the decision appealed from should be affirmed.. 16

TABLE OF CASES CITED:

PAGE

Arizona Employers' Liability Cases, 250 U. S. 400..7, 9

Jeffrey Mfg. Co. v. *Blagg*, 235 U. S. 571.....14, 15

Matter of Chrystal v. *United States Trucking Corp.*, 250 N. Y. 566 2

Matter of Jensen v. *Southern Pacific Co.*, 215 N. Y. 514 .....5, 7

Matter of State Treasurer v. *Niagara Falls Power Co.*, 241 N. Y. 521 2

Matter of Treasurer v. *West Side Trucking Co.*, 233 N. Y. 202 2

Matter of Zirpola v. *Casselman, Inc.*, 237 N. Y. 367 5

Mountain Timber Co. v. *Washington*, 243 U. S. 219.. 8

New York Central Railroad Co. v. *White*, 243 U. S. 188 .....5, 6, 8, 15

New York State Railways v. *Shuler*, 265 U. S. 379.. 5

Noble State Bank v. *Haskell*, 219 U. S. 104..... 11

People v. *Brounstein*, 248 N. Y. 308 15

Piziiz Dry Goods Company v. *Yeldell*, 274 U. S. 112 9

Sheehan Co. v. *Shuler*, 265 U. S. 371.....5, 8, 9

Travelers Insurance Co. v. *Brass Goods Mfg. Co.*, 239 N. Y. 273 5

Travelers Insurance Co. v. *Padula Co.*, 224 N. Y. 397 .....5, 7

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BRIEF FOR APPELLEE.

The Opinions Below.

The opinion of the Court of Appeals of the State of New York in the case now before the Court is reported in 251 N. Y. 127, and is printed in the transcript of record here, pages 614. The Opinion of the Appellate Division of the Supreme Court of the State of New York is reported in 224 App. Div. 346, and is printed in the record, pages 21-24.

Statement.

The case was heard in the first instance by the Appellate Division of the Supreme Court, Second Judicial Department, upon an Agreed Statement of Facts, under

Sections 546, 548 of the Civil Practice Act, and resulted in a judgment in favor of the appellee and against the appellant with an opinion by Seeger, *J.*

This judgment was affirmed by the Court of Appeals with an opinion by Hubbs, *J.*, with two of the judges of the Court of Appeals dissenting with an opinion by Lehman, *J.*

The case involves the constitutionality of that part of Section 29 of the Workmen's Compensation Law of the State of New York (Consolidated Laws, Chapter 67, Section 29) as amended by Chapter 615 of the Laws of 1922, Section 1, under which the Legislature, in cases where an employee is killed through the negligence of another not in the same employ, gave to the employer or insurance carrier, a right of action to recover against such third party the sum of $1,000 paid to the Treasurer of the State of New York under subdivisions 8 and 9 of Section 15 of said New York State Workmen's Compensation Law, which right of action is, as stated in the amended Section 29, "in addition to any cause of action by the legal representatives of the deceased."

The provisions of the statute in question are set forth at length in the appendix to the brief for appellant.

Upon the trial appellant also contended that the award of $1,000 was improperly made under the facts in this case, but the Court of Appeals had held to the contrary in *Matter of State Treasurer* v. *West Side Trucking Co.*, 233 N. Y. 202; *Matter of State Treasurer* v. *Niagara Falls Power Co.*, 241 N. Y. 521, and *Matter of Chrystal* v. *United States Trucking Corporation*, 250 N. Y. 566, and as this point merely involves a construction of a state law, it is not presented here.

Agreed Facts.

On February 24th, 1927, one Joseph Peroth was in the employ of one Anderson, and the latter had complied with the provisions of the Workmen's Compensation Law of the State of New York by insuring himself with the appellee against liability for the payment of workmen's compensation to his employees, including Peroth.

Peroth, on February 24th, 1927, while in the regular course of his employment by Anderson, was struck by a train owned and operated by the appellant, receiving injuries which caused his death, such injuries resulting solely by reason of the negligence of the appellant.

Peroth left surviving a widow. An administratrix of the estate was appointed, and suit was brought against the appellant on behalf of the widow. This suit was settled and discontinued before trial, the appellant paying to the administratrix the sum of Fifteen thousand ($15,000) Dollars, and receiving a general release therefor.

The sum of Fifteen thousand ($15,000) Dollars received by the widow was in excess of the amount which the widow would have received by way of compensation or death benefits if claim had been made by her against Anderson, the employer, and the appellee, the insurance carrier, pursuant to the Workmen's Compensation Law.

Thereafter, and pursuant to subdivisions 8 and 9 of Section 15 of the Workmen's Compensation Law, an award of $1,000 was made to the State Treasurer of the State of New York against said Anderson, and against the appellee. Said award was paid by the appellee to the State Treasurer on December 27th, 1927. The appellee demanded repayment of this sum from the appellant, which demand was refused.

The Questions Presented.

The only questions presented on this appeal are whether Section 29 of the Workmen's Compensation Law, under such Agreed Facts, violates the due process and the equal protection clauses of the Fourteenth Amendment of the Federal Constitution.

ARGUMENT.

I.

The provision of the New York Workmen's Compensation Law under review does not violate the due process clause of the Fourteenth Amendment and is justified because the wrongful act of appellant resulted in the death of the employee and set in motion the liability to the State Treasurer, because it promotes the public welfare, and is a part of the plan and scope of the Workmen's Compensation Law.

Section 29 of the New York Workmen's Compensation Law covers those cases in which an employee is injured or killed by the negligence of another not in the same employ. In case of death the section gives the dependents the option of taking the benefits of the Workmen's Compensation Law or the option of a suit to recover damages against the third person through whose negligence the employee was killed. Where there is an election to take compensation the employer or the insurance carrier paying the same may recover against the wrongdoer, and the damages may exceed the amount paid to

the dependents under the Compensation Law (*Travelers Insurance Co.* v. *Padula Co.*, 224 N. Y. 397; *Matter of Zirpola* v. *Casselman, Inc.*, 237 N. Y. 367; *Travelers Insurance Co.* v. *Brass Goods Mfg. Co.*, 239 N. Y. 273). If the dependents elect to sue the wrongdoer and receive less than the benefits of the Compensation Law, they may recover the deficiency of compensation from the employer or the insurance carrier. The provisions of Section 29 outlined up to the present time were contained in the statute when the same was upheld by the Court of Appeals of the State of New York in *Matter of Jensen* v. *Southern Pacific Co.*, 215 N. Y. 514, and by this Court in *New York Central Railroad Co.* v. *White*, 243 U. S. 188.

Subdivisions 8 and 9 were later added to Section 15 of the Compensation Law, and the constitutionality of these subdivisions was passed upon and upheld by this Court in *Sheehan Co.* v. *Shuler*, 265 U. S. 371, and in *New York State Railways* v. *Shuler*, 265 U. S. 379. This, however, was before the amendment of Section 29 which is now in question, which amendment merely gives to the employer or insurance carrier the right to recover back from the wrongdoer the award made to the State Treasurer under such subdivisions of Section 15.

The whole scheme of Section 29 of the Compensation Law, including that of the amendment in question, is to require the wrongdoer to make full restitution for any compensation payments arising through his wrongful act. The Legislature has merely said in substance—"the wrongdoer must pay"—and as stated by Mr. Justice Hubbs in the Court below:

"The argument that the State cannot lawfully

> place that burden upon those who are directly and wrongfully responsible for it is not convincing" (R., 11).

One of appellant's main arguments in attempting to show that the law in question contravenes the due process clause of the Fourteenth Amendment seems to be based upon the contention that the recovery by the administratrix of the estate of the decedent under Section 130 of the Decedent Estate Law is in full restitution for the wrongful death of the employee Peroth. The argument seems to be that the Legislature, when it authorized the cause of action on behalf of next of kin for wrongful death, made a pronouncement that the recovery should be in full restitution, which is equivalent to saying that the Legislature has no power to change the law or increase the damages. There can be no basis in law for such contention because (1) the right to recover damages for wrongful death is created solely by act of the Legislature which has exclusive power to determine both the measure of damages and the beneficiaries, and (2) because no one has any vested right to have such law remain unchanged.

With reference to the creation of the cause of action, attention is respectfully called to the following from the opinion of this Court in the case of *New York Central Railroad Co.* v. *White, supra,* viz.:

> "It may be added by way of a reminder, that the entire matter of liability for death caused by wrongful act both within and without the relationship of employer and employee, is a modern statutory innovation, in which the states differ as to who may sue, for whose benefit, and the measure of damages" (243 U. S. at p. 200).

The same subject is aptly summarized in the decision of the Court of Appeals in *Travelers Insurance Co.* v. *Padula Co., supra,* in the following language:

> "A civil liability and the right to recover damages for wrongful act or neglect causing death are created solely by statute. At common law no civil action would lie for causing the death of a human being. Legislative enactment is the exclusive source and boundary of the liability and the remedy. It may create the cause of action, define the period of its existence, and the party by whom and the method in which it shall be enforced and prescribe the measure of damages and the beneficiaries" (224 N. Y. at p. 402).

Further answering the proposition that a recovery under Section 130 of the Decedent Estate Law is full restitution, attention is called to the *Arizona Employers' Liability Cases,* 250 U. S. 400, wherein it was pointed out by this Court that no vested right exists to have such laws remain unchanged, and that the establishment of the cause of action and the changes in the laws creating the same, is left to the several states.

Through the enactment of this provision into Section 29 of the Compensation Law, the State Legislature has merely created an additional cause of action to the extent of $1,000. It had the same right to enact this legislation, the same right to say that the State Insurance Fund, the employer, or the insurance carrier, may recover the amount awarded and paid to the State Treasurer, as it had to write into the statute the provisions of Section 130 of the Decedent Estate Law.

In *Matter of Jensen* v. *Southern Pacific Co.* (*supra*), the plan of the Workmen's Compensation Law is con-

cisely stated in the opinion per Miller, *J.* in the following language:

> "The scheme of the statute is essentially and fundamentally one by the creation of a state fund to insure the payment of a prescribed compensation based on earnings for disability or death from accidental injuries sustained by employees engaged in certain enumerated hazardous employments" (215 N. Y. at p. 519).

This Court in the case of *New York Central Railroad Co.* v. *White, supra,* said that,

> "One of the grounds of its (the public's) concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime."

In *Mountain Timber Co.* v. *Washington,* 243 U. S. 219, this Court further stated that

> "It hardly would be questioned that the State might expend public moneys to provide hospital treatment, artificial limbs, or other like aid to persons injured in industry, and homes or support for the widows and orphans of those killed."

Subsequently this Court, in *Sheehan Co.* v. *Shuler, supra,* in upholding subdivisions 8 and 9 of Section 15 of the Compensation Law, and answering the same argument which is advanced here, namely, that a stranger, is being called upon to pay $1,000 for the purposes therein described, made the following pronouncement:

> "We do not think that the due process clause of the Fourteenth Amendment requires that such

> additional compensation to injured employees of the specified classes, should be paid by their immediate employers, or prevents the legislature from providing for its payment out of general funds so created."

Surely, if employers generally may be required to contribute to the beneficial fund created by subdivisions 8 and 9 of Section 15 of the Compensation Law, there can be no offence against the due process clause of the Fourteenth Amendment by an act of the Legislature requiring those who wrongfully cause the employee's death to make restitution for such contributions.

At this point we call attention to the fact that in the dissenting opinion in the Court below, no case is cited to show that the law in question violates the due process clause of the Fourteenth Amendment, and the dearth of citations in the brief for appellant upon the same question is also significant. Many decisions in this Court, however, support the law in question. The case of *Sheehan Co.* v. *Shuler, supra,* is in point, and special reference is also made to the following cases:

In *Arizona Employers' Liability Cases* (*supra*), this Court had under consideration the constitutionality of the act of the Legislature of the State of Arizona, which in certain cases created new causes of action and authorized the recovery of unlimited damages and in which it was held that the law did not offend against the due process clause of the Federal Constitution.

In *Pizitz Dry Goods Company* v. *Yeldell,* 274 U. S. 112, a statute of the State of Alabama permitting the recovery of punitive damages against an employer in a case where death resulted through the negligence of an

employee, was held to be constitutional. In that case the Court said:

> "Lord Campbell's Act and its successors, establishing liability for wrongful death where none existed before, the various Workmen's Compensation Acts, imposing new types of liability, are familiar examples of the legislative creation of new rights and duties for the prevention of wrong or for satisfying social and economic needs. Their constitutionality may not be successfully challenged merely because a change in the common law is effected. As interpreted by the state court, the aim of the present statute is to strike at the evil of the negligent destruction of human life by imposing liability, regardless of fault, upon those who are in some substantial measure in a position to prevent it. We cannot say that it is beyond the power of a legislature, in effecting such a change in common law rules, to attempt to preserve human life by making homicide expensive. It may impose an extraordinary liability such as the present, not only upon those at fault but upon those who, although not directly culpable, are able nevertheless, in the management of their affairs, to guard substantially against the evil to be presented."

In the same case also this Court intimated that the burden of making compensation for wrongful death could be imposed upon the wrongdoer without regard to the relationship of employer and employee. It is stated in the opinion that the states "may impose on the business or enterprise in which such loss of life occurs the economic burden of the protective measure adopted" (274 U. S. at p. 116). Thus in the instant case, the New

York Legislature enacted a protective measure by setting up the funds provided by subdivisions 8 and 9 of Section 15 of the Compensation Law, and it follows that it might impose the economic burden involved on the business in which the loss of life occurs. It was the business of the appellant which caused the loss of life in this case, and upon such business the economic burden should rest.

The case of *Noble State Bank* v. *Haskell,* 219 U. S. 104, appears also to be decisive in principle. That was a case construing a law of the State of Oklahoma requiring every bank incorporated under the law of the state to pay an assessment as a guarantee fund to secure a repayment in full to depositors in the case of any other state bank which might become insolvent. Any bank, no matter how solvent, is compelled to contribute to a fund for the protection of depositors in every other bank, although there is no direct relation between such depositors and the contributing bank, nor do the contributing banks have any control over the management of the bank which might become insolvent. Nevertheless, the act was upheld as a proper exercise of the police power and in the public interest. We fail to see how the act in question, requiring as it does the one who has committed a wrong to contribute to these funds, can be said to be unconstitutional when it has been held that the public welfare is promoted by the insurance of bank depositors by the levy of an assessment based upon the average daily deposits of all banks within the state.

It is to be observed also that there is no taking of property under the law in question without the opportunity of a defense. In the case now under discussion the negligence of the appellant was conceded, but if a suit were brought the defendant would have available

every defense which it would have in a suit by the personal representative under Section 130 of the Decedent Estate Law; and in view of the fact that the defendant is not a party to the proceeding upon the award to the State Treasurer, it would not be bound by such decision, and would also have available every defense as to the validity of the award which the employer or insurance carrier could have pleaded when the award was made.

Appellee asserts with confidence that the law in question is supported by social, economic and legal justifications. The State has exclusive jurisdiction to determine what amount shall be paid for a wrongful death, and for whose benefit. The reimbursement of the appellee in this case, which happens to be an insurance carrier, is somewhat beside the question. The primary duty of paying compensation is upon the employer who, under Section 50 of the Compensation Law, may pay the compensation directly under certain conditions, or may give security for such payment through an insurance company. No question of duty is involved as between appellant and appellee except the duty imposed by the Legislature under which appellant is required to make good any outlay made necessary by its wrongful act. There is a duty also to the public and to the industry upon which the burden of compensation is thrown. Appellee also disputes with emphasis the suggestion that appellant is a stranger to the compensation proceeding. One who sets in motion a compensation proceeding by its negligence is far from a stranger to such a proceeding.

Appellee respectfully submits that the provision under review is not arbitrary and is not unreasonable, that there is no taking of property without due process of law, and that the provision is not in violation of the due process clause of the Fourteenth Amendment.

II.

The provision under review does not set up any classification founded upon an unjust basis and does not violate the equal protection clause of the Fourteenth Amendment.

The provisions of subdivision 8 of Section 15 of the Compensation Law creating a fund for the payment of compensation to certain employees who become totally disabled, and the provisions of subdivision 9 of the same section creating funds for the rehabilitation of disabled workmen require the payment of $500, under each subdivision, in every case where the death of an employee is due to an accidental injury, and where no award is made to any dependent. Such is the construction of these subdivisions as determined by the Court of Appeals.

It has also been the scheme of the Workmen's Compensation Law, from the time of its enactment, that if the death of the employee was caused by the wrongful act of another, such person or corporation should make payment for the wrongful act either by way of damages recovered by the next of kin, or by way of a recoupment to the employer or insurance carrier who pays the compensation.

It is conceded of course that the wrongdoer is not called upon to recoup the employer or insurance carrier in every case of wrongful death. There can be no award to the State Treasurer except where there are no dependents, or, where the dependents recover from the wrongdoer a sum in excess of the compensation benefits. Where, however, there are no dependents or where, like in the instant case, no award of compensation can be made, the sum of $1,000 is payable to the State Treasurer, and

under Section 29, the employer or insurance carrier, upon paying the award has a right of action against the person who by wrongful act occasioned the death of the employee.

The law is uniform in requiring that the wrongdoer shall make good the payment of any award of $1,000 which may be made to the State Treasurer.

While it is true that this additional liability for the wrongful taking of life does not apply to every case, it is equally true that damages for wrongful death, especially within the State of New York, has never been uniform. The measure of damages under Section 130 of the Decedent Estate Law is the *pecuniary loss* to the next of kin. This loss varies in accordance with the earnings of the decedent, his station in life, and particularly in relation to the surviving dependents. The cost of wrongfully taking human life is far more expensive when a widow and children are left dependent than in a case where the next of kin have received no support from the decedent. And as stated by this Court in *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, at page 577, in speaking of alleged violations of the equal protection clause of the Fourteenth Amendment,

> "That a law may work hardship and inequality is not enough."

The only inequality in the present case is the fact that the Legislature has not required the payment of $1,000 in every case, and certainly it cannot be said as a matter of law that any hardship is imposed upon an industry simply because it has been made liable for an additional $1,000 in certain cases of wrongful death.

As pointed out in the Court below, in the opinion per Hubbs, *J.*, citing *New York Central Railroad Co.* v. *White, supra,* "States having similar statutes differ as to who may sue, for whose benefit, and the measure of damages" (R., 12), and as also pointed out in the Court below in some states the statute imposes a penalty (R., 13).

We assert with confidence that the Legislature could have required the payment of One thousand ($1,000) Dollars for the purposes mentioned in subdivisions 8 and 9 of Section 15 *in every case of wrongful death* whether the employee be subject to the Compensation Law or not, and irrespective of any amount awarded to or recovered by dependents. Appellant says that the present law is unequal because it does less. This argument is fully answered in *People* v. *Brounstein,* 248 N. Y. 308. In that case the provision of the Education Law requiring attendance at continuation schools, which did not apply to all children alike, was attacked as unconstitutional for the very same reason as here advanced. The Court held that the legislation was not discriminatory, and the following from the opinion per Andrews, *J.*, might well be paraphrased and applied to the case now before the Court:

> "The Legislature might forbid all minors under 18 to engage in regular work during the hours of the school day. It might require them to spend those hours in study. *It may do less"* (248 N. Y., p. 312). (Italics ours.)

The case *Jeffrey Mfg. Co.* v. *Blagg, supra,* and the authorities therein cited are similar in principle. In the *Jeffrey* case, it was held that the Compensation Law of

Ohio, which had application only to shops with five or more employees, did not result in arbitrary and unreasonable classification.

In conclusion appellee respectfully submits that the following quoted from the prevailing opinion in the Court below, is a concise summary of the reasons for upholding the provision under review.

> "Subdivisions 8 and 9 of section 15 and section 29, construed together, and in connection with the other provisions of the Workmen's Compensation Law, are 'component parts of a single scheme' and constitute a valid constitutional statute. The wrongdoer is made responsible for his wrongful act, the statute promotes the public welfare, and lawfully imposes a penalty upon the wrongdoer. It is uniform, in that it gives a right of action against all who wrongfully cause the death of an employee specified in the statute" (R., 14).

III.

Appellee respectfully submits, therefore, that the provision under review does not violate any clause of the Fourteenth Amendment, and that the decision appealed from should be affirmed.

Respectfully submitted,

JEREMIAH F. CONNOR,
Attorney for Appellee.